

Judicial Campaign Ethics Experiment

By Thomas K. Byerley

Canon 7 of the Michigan Code of Judicial Conduct states broadly that “[a] judge should refrain from political activity inappropriate to his/her judicial office” and that candidates “should maintain the dignity appropriate to judicial office.” More specifically, Canon 7 sets out certain “campaign conduct” and “campaign guidelines” that proscribe any false statements and certain misrepresentations during the course of judicial campaigns. In short, Canon 7 hopes to dissuade the so-called “negative advertising” found in many nonjudicial races.

The 1996 judicial election campaign season produced many complaints that campaign practices of some judicial candidates did not meet this lofty standard. After the 1996 judicial election cycle, then-president Victoria A. Roberts asked the State Bar’s

Subcommittee on Judicial Ethics to study the ethics of judicial campaigns and make recommendations on how to elevate the ethical conduct of candidates for judicial office. Subsequent presidents Edmund M. Brady, Jr. and J. Thomas Lenga have been equally committed to this goal and have encouraged this effort.

During its study, the Subcommittee on Judicial Ethics found that one major concern was that there was no prompt way to address allegedly improper campaign tactics. Under the system in place for all previous elections, an “aggrieved” candidate could only file a complaint with either the Judicial Tenure Commission (if a sitting judge engaged in the campaign activity) or the Attorney Grievance Commission (if a lawyer engaged in the campaign activity). The investigations by these agencies took considerable time, but more importantly, the results of the investigations were many times unsatisfactory.

Even if a candidate violated ethics rules during the campaign, many times no discipline was ultimately imposed by the investigating agency. For example, if the candidate lost the election, the investigating agency would close its investigation file, presumably under the schoolyard basketball philosophy of “no blood, no foul.” The Ethics Committee found, however, that the legal profession, in general, and the judiciary, in specific, loses respect in this process.

A task force of the Subcommittee on Judicial Ethics, chaired by Jackson County

Probate Judge Susan E. Vandercook, studied other states’ responses to this issue and formulated recommendations on how to quickly address allegedly improper campaigning practices of judicial candidates. The recommendations of the task force were forwarded to the Judicial Conference (a State Bar Section Council comprised of 28 sitting judges from around Michigan) for review and study. The Judicial Conference made minor changes to the proposals and then voted to recommend that they be adopted.

New Program

The State Bar’s Board of Commissioners adopted the recommendations of the Ethics Committee, as modified by the Judicial Conference, for implementation as a pilot program for the 1998 election campaign season. The 1998 Michigan Judicial Election Campaign Conduct program consisted of the following:

- All candidates for contested judicial elections to trial courts in 1998 were offered the opportunity to participate in the program;
- First, and foremost, the program was voluntary. Any judicial candidate had the opportunity to decline to participate. The program did not, in any way, restrict a candidate’s right of free speech;
- Candidates who chose to participate signed an “Agreement Regarding Judicial Conduct,” which pledged that the candidate would participate in the program and



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that the candidate *and other individuals under the direction and control of the candidate* would comply with all ethics rules for campaign conduct;

- The president of the State Bar of Michigan appointed multiple five-member "Judicial Election Panels," comprised of lawyers and nonlawyers. These panels were to receive, investigate and issue rulings on judicial campaign conduct;

- Individuals who had complaints about judicial campaign conduct filed the complaints with the State Bar. Upon receipt, the complaint was forwarded immediately to the chairperson of the Judicial Election Panel in the election district;

- The Judicial Election Panel met when specially convened. At those meetings, the panels considered the complaints and gave the respondent a chance to defend the campaign conduct;

- The panel then issued a decision within 48 hours of the meeting of the panel. Action on the complaints was within the sole discretion of the panels;

- If the panel found the complaint to be valid, it could ask the candidate to withdraw any particular advertisement or statement or to take such other action, as it deemed appropriate;

- The chairperson of the panel could communicate with the news media the decision of the panel, if the respondent refused to correct inappropriate behavior; and

- If a candidate did not agree to participate in the program, the panel could still investigate allegations of false, misleading, unfair, unethical or illegal statements and make public comment, refer the matter to the Attorney Grievance Commission, or Judicial Tenure Commission, or take any other appropriate action.

This experimental program reflects a widely shared view that judicial elections are in some respects different from elections of a person seeking executive or legislative positions. As stated in the Michigan Judicial Election Panel Objectives:

"The judicial oath requires judges to administer justice to all in a nonpartisan manner; to be arbiters of conflicts, not spokespersons for the varying interests of certain political or geographical constituencies; and to retain an open mind on issues or matters that may come before them. Thus, judicial candidates should aspire to a higher standard of campaign conduct. It is hoped that this new review mechanism will assist all judicial candidates in meeting this objective,

thereby maintaining public confidence in our legal system."

Implementation Data

For the 1998 trial court judicial elections in Michigan, there were 101 candidates running unopposed for re-election. These candidates were not included in the program because they were not involved in contested races. For the primary election in August, there were 121 announced candidates for 61 judicial vacancies at the trial court level. After the primary, there were 94 candidates still in the running for the 61 available judgeships. Before the primary election, 84 of the 121 initial candidates (69.4 percent) agreed to participate in the State Bar of Michigan's Judicial Campaign Ethics Program. After the primary election, 69 of the remaining 94 candidates (73.4 percent) agreed to participate. During the primary campaign season, the State Bar of Michigan only received one inquiry. This complaint was successfully resolved by and agreement to alter campaign conduct.

Between the primary election and the general election, the State Bar of Michigan received six requests for action. After investigation, the panels determined that four of the complaints did not constitute a clear ethics violation. In the other two cases, the respondent agreed to immediately alter the campaign conduct to comply with ethics rules. Therefore, none of the inquiries resulted in formal public action by the Ethics Panels.

Final Assessment

It is impossible to precisely quantify how well the Judicial Campaign Ethics Rapid Response Program worked for the 1998 campaign season, although the evidence clearly suggests that the program was a success.

In 1996, the State Bar of Michigan received numerous complaints of unethical and unfair judicial campaigns by candidates clearly violating the Michigan Code of Judicial Conduct. The Judicial Tenure Commission and the Attorney Grievance Commission also received complaints of unethical conduct. In 1998, however, all candidates for judicial election to trial courts were notified that the State Bar was "looking over their shoulder." The Ethics Hotline received over 100 calls from judicial candidates asking for ethical guid-

ance before campaign literature or advertising was prepared.

Further, the State Bar of Michigan received numerous compliments from the candidates about the program, who seemed truly appreciative of the State Bar's efforts to maintain high ethical standards for judicial campaigns. The program appeared to heighten all candidates' awareness of ethical considerations for judicial campaigns. The fact that only six formal complaints were received and none needed formal action is evidence that the program was helpful.

As with any experimental program, lessons were learned. When the Board of Commissioners considers repeating this program for the 2000 campaign season, some modifications and amendments will likely occur. In the days of increasingly "negative" campaigns, however, it remains a strong goal of the Ethics Committee to maintain high ethical standards for judicial campaigns. ■